82-4

NO.

Office - Supreme Court, U.S.
FILED
JUL 3 1982
ALEXANDER L. STEVAS,
CLERK

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1981

B. F. DIAMOND CONSTRUCTION COMPANY
AND
FIDELITY AND CASUALTY COMPANY
OF NEW YORK

Petitioners,

vs.

DIRECTOR, OFFICE OF
WORKERS' COMPENSATION PROGRAMS,
U.S. DEPARTMENT OF LABOR &
ELIZABETH BROWNING,
Widow of Joseph D. Browning,

Respondents,

Petition for Writ of Certiorari
to the United States Court of
Appeals for the Eleventh Circuit

Brief of Petitioners

JOHN E. HOUSER
640 Florida National Bank Bldg.
Jacksonville, Florida 32202-4375
Telephone No. 904-354-5519

Attorney for Petitioners

QUESTIONS PRESENTED

1. Whether a bridge construction superintendent or rig foreman while standing or highlighting engineering marks upon a bridge footing permanently affixed to a river bed and crushed by a falling group of reinforcing rods mounted upon an adjacent footing,

(a) has such a realistically significant relationship to maritime activity or

(b) was then engaged in "longshoring operations" to afford coverage under the Longshoremens and Harbor Workers Compensation Act.

2. Whether, in a claim filed under the Longshoremens and Harbor Workers Compensation Act, the United States Court of Appeals for the Eleventh Circuit can find as a fact that an employer is engaged in "longshoring operations" or that a death occurred upon a covered situs when such has not been found, or considered, below and no facts in the record support such a finding.

LIST OF PARTIES

Pursuant to Rule 21.1(b), Rules of the Supreme Court, the parties to the proceeding below and those at interest therewith in the matter are as follows:

1. Elizabeth F. Browning, Widow
   Atwood Alan Browning, Son
   Debra Lynn Browning, Daughter
   of Joseph D. Browning, deceased,
   Claimants-Respondents

2. Richard J. Harris, Attorney for Claimants-Respondents

3. B. F. Diamond Construction Company and Hardaway Construction Company, Employer and Parent Company, Employer-Petitioner

4. Continental Insurance Company as parent of Fidelity and Casualty Company of New York, Carrier-Petitioner

5. Director, Office of Workers' Compensation Programs, a Respondent below.

TABLE OF CONTENTS

Page

QUESTION PRESENTED.....i

LIST OF PARTIES.....ii

TABLE OF CONTENTS.....iii

TABLE OF AUTHORITIES.....v

OPINION BELOW.....2

JURISDICTION.....2

STATUTE INVOLVED.....2

STATEMENT OF THE CASE.....3

REASONS FOR GRANTING THE WRIT.....6

1. Conflict with a Decision of the Court.....6

2. Conflict with a Decision of the Court.....6

3. Conflict with a Decision of the Court.....6

4. Conflict with a Decision of the Ninth Circuit Court....7

5. Conflict with a Decision of the Second Circuit Court...7

6. Conflict with a Decision of the Second Circuit Court...7

7. This concerns a Question of Substantial Statutory Construction.....7

8. The Importance of the Issue.....7

9. The Case Below Eliminates the Situs and Status Test.....9

10. Conflict with the Decision of the Fifth Circuit Court.....10

11. Conflict with a Decision of the Court 10

12. Conflict with a Decision of the Ninth Circuit Court.. 10

CONCLUSION 11

CERTIFICATE OF SERVICE.....12

APPENDIX A:.....A-1
Order of the Court of Appeals for Fifth (Eleventh) Circuit, dated May 17, 1982

APPENDIX B:.....B-1
Order of the Benefits Review Board dated June 11, 1981.

APPENDIX C:.....C-1
Order of the Administrative Law Judge dated April 29, 1980.

TABLE OF AUTHORITIES

CASES

Page

Avondale Shipyards, Inc., v. Vinson,
623 F.2d 1117 (5th Cir. 1980) 10

Churhill v. Perini North River Associates,
652 F.2d 255 (2d Cir. 1981) ..... 8.

Fusco v. Perini North River Associates,
622 F.2d 1111 (2d Cir. 1980)
cert. denied 101 S.Ct. 959 (1981) 7

Hemminger v. Newport News Shipbuilding & Dry Dock Co.,
13 BRBS 1099 (1981) 6,9

LeMelle v. B. F. Diamond Const. Co.,
13 BRBS 542 (1981) 9

Nacirema Operating Co. v. Johnson,
396 U.S. 212 (1969) 9

Neely v. Pittston Stevedoring Corp.,
12 BRBS 859 (1980) 9

Nold v. Guy F. Adkinson Co.,
9 BRBS 620 (1979) 9

Northeast Marine Terminal Co. v. Caputo,
432 U.S. 249 (1977) 6,8

P. C. Pfeiffer Co., Inc. v. Ford,
444 U.S. 69 (1979) 6,8

Perkins v. Marine Terminals Corp.,
673 F.2d 1097 (9th Cir. 1982) 10

Presley v. Tinsley Maintenance Service,
529 F.2d 433 (5th Cir. 1976) 10

U.S. Industries/Federal Sheet Metal, Inc. v. Dir., OWCP,
___ U.S. ___,
71 L.Ed 2d 495 (1982) 10

Weyerhaeuser v. Gilmore,
528 F.2d 957 (9th Cir. 1975) 7

UNITED STATES STATUTES

28 USCA §1243(1) 2

33 USCA §902(3) 2

33 USCA §902(4) 2

33 USCA §903(a) 3

33 USCA §921 3

MISCELLANEOUS

118 Cong. Rec 36385 Part 27 8

Ballentine's Law Dictionary, 3d Ed. 9,10

The Oxford Universal Dictionary, 3d Ed. 10

Webster's Collegiate Dictionary, 2d Ed. 9,10

IN THE
SUPREME COURT
OF THE UNITED STATES
October Term, 1981

B. F. DIAMOND CONSTRUCTION COMPANY
AND
FIDELITY AND CASUALTY COMPANY
OF NEW YORK

Petitioners,

vs.

DIRECTOR, OFFICE OF
WORKERS' COMPENSATION PROGRAMS,
U.S. DEPARTMENT OF LABOR &
ELIZABETH BROWNING,
Widow of Joseph D. Browning,

Respondents,

Petition for Writ of Certiorari
to the United States Court of
Appeals for the Eleventh Circuit

Petitioners respectfully pray that a Writ of Certiorari issue to review the judgment and opinion rendered by the United States Court of Appeals for the Eleventh Circuit, in the captioned matter on May 17, 1982.

OPINION BELOW

The opinion of the Court of Appeals for the Eleventh Circuit in the captioned matter is reported at 676 F.2d 547, (1982), and is reprinted as Appendix A hereto, *infra.* p. A-1.

The opinion of the Benefits Review Board (United States Department of Labor) is reported at 14 BRBS 313 and is reprinted as Appendix B hereto, *infra,* p. B-1 and the opinion of the Administrative Law Judge is reprinted as Appendix C, *infra,* p. C-1.

JURISDICTION

The opinion of the Court of Appeals for the Eleventh Circuit was rendered on May 17, 1982. The jurisdiction of this Court is invoked under 28 USCA §1254(1).

STATUTE INVOLVED

The relevent portions of the Longshoremens and Harbor Workers' Compensation Act, as amended, are as follows:

33 U.S.C. §902(3):

> The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker.

33 U.S.C. §902(4):

> The term "employer" means an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel).

33 U.S.C. §903:
(a) Compensation shall be payable under this Act in respect of disability or death of any employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel).

33 U.S.C. §921:
(b) (3) The Board shall be authorized to hear and determine appeals raising a substantial question of law or fact taken by any party in interest from decisions with respect to claims of employees under this Act and the extensions thereof. The Board's order shall be based upon the hearing record. The findings of fact in the decision under review by the Board shall be conclusive if supported by substantial evidence in the record considered as a whole...

(4) (c) Any person adversely affected or aggrieved by a final order of the Board may obtain a review of that order in the United States court of appeals for the circuit in which the injury occurred. *** Upon such filing, the court shall have the power to give a decree affirming, modifying, or setting aside, in whole or in part, the order of the Board ***.

STATEMENT OF THE CASE

B. F. Diamond Construction Company, a bridge building company,[1] was building an interstate highway bridge across

[1] Though this company in the past had done marine construction work, the employee had only done bridge construction work for the past five years. Approximately one year before this accident, Diamond had been purchased by another company and had done bridge construction projects exclusively.

the Choctawhatchee Bay in Okaloose County, Florida. As the Administrative Law Judge found:

> At the time of the accident, the employee was standing on top of a "footing" consisting of precast piles driven into the riverbed and capped with a small concrete platform. A cage formed by steel reinforcing rods and used to strengthen the concrete columns which would ultimately connect the footing to the superstructure bridge fell on top of the employee, crushing him to death. [C-2]

The next activity would have been to put concrete molds or forms around the cages. These would hold the concrete in place until it was set. The record does not disclose when those metal forms would be put in place or if the employee would have participated in that work.

The Administrative Law Judge concluded that the employee-decedent was not engaged in longshoring operations, [C-3] a harbor worker, or a person engaged in maritime employment.[2] [C-4]

The Benefits Review Board said in part:

> Since there was no eyewitness to the accident, the record does not establish exactly what activity the employee was engaged in at the time of death. [B-2]

The Board, one member dissenting, affirmed the ruling below. [B-1 et seq]

The Court of Appeals, by its decision "found" that B. F. Diamond was engaged in "various maritime construction projects"; [A-3] and that "at the time of his injury, [Browning] was involved with the unloading of the metal forms from a barge moored in navigable waters". [A-5]

The only support for the Court of Appeals finding of fact is a wishful statement by the claimant's counsel

> I think the evidence will show if we were able to produce this live testimony that the time - or could at

---

[2] Your petitioner argued before the ALJ that this injury did not occur on a covered situs as defined by the Act before the 1972 Amendments. The Administrative Law Judge never reached that point [C-4] The Board said "we do not reach the situs issue raised by the claimant." [B-6] The court of appeals, *sua sponte*, ruled he was upon a covered situs [A-6] and suggested such ruling was "not disputed" [A-6] – though it clearly was.

least look and see what these people know - that at the time of the accident he was involved in directing the operations of this crane operator and in moving the steel forms into place ***. But in the process, if you will, of unloading these forms from the barge and loading them on top of this concrete platform for - part of this job. [A-5]

From this statement of counsel, the Court of Appeals held:

> The conclusion that Browning was engaged in longshoring activities cannot be avoided. It is enough that Browning was "directly involved" with the unloading of a vessel at the time of his injury. [Citation omitted.] Therefore we conclude that Browning was an employee within the terms of the Act. [A-5]

The Court of Appeals also held

> And though the issue of whether Browning was injured while on "navigable waters" was not explicitly decided by ALJ or the Review Board, no real question is raised on this point. [A-6][3]

---

3 As we indicated previosly, in n. 2, this is simply not true.

REASONS FOR GRANTING THE WRIT

1.

The decision below conflicts with the holding of the Court in *Northeast Marine Terminal Co. vs. Caputo,* 432 U.S. 249 (1977) as the Eleventh Circuit said the claimant can meet the status test by showing "Browning was 'directly involved' with the unloading of a vessel at the time of his injury" [A-5] whereas the Court had previously held it was "the obvious desire (of Congress) to cover longshoremen whether or not their particular task at the moment of injury is clearly a 'longshoring operation'. The theory does not comport with the Act's focus on occupations and its desire for uniformity." 432 U.S. at 276.[4]

2.

The decision below conflicts with the Court's decision in *Northeast Marine Terminal Co. v. Caputo,* 432 U.S. 249 (1977) in that it does not involve the trade-off of ship owners, stevedores, and workers mentioned in 432 U.S. at 261; Browning is not one within the "affirmatively (described) Class of workers Congress desired to compensate." 432 U.S. at 264; he is not in one of those "occupations - longshoreman, harbor worker, ship repairman, shipbuilder, shipbreaker" to which it was desired "to provide continuous coverage throughout their employment". 432 U.S. at 273.

3.

The decision below conflicts with the Court's holding in *P. C. Pfeiffer Co., Inc. v. Ford,* 444 U.S. 69, 82 (1979) wherein the Court said

---

4 The BRB in *Hemminger v. Newport News Shipbuilding and Dry Dock Co.,* 13 BRBS 1099, 1101 (1981) records that the Director, OWCP, agreed the "moment of the injury" test is not proper for determining "status" under the Act. The Board reaffirmed that view. *Hemminger* demonstrates, too, the consistent holding of the Board that the "moment of injury" test is improper.

> We believe that §2(3)'s explicit use of the terms "longshoreman" and "other person engaged in longshoring operations" to describe persons engaged in maritime employment demonstrates that workers doing tasks traditionally performed by longshoremen are within the purview of the 1972 Act.

Yet below Browning was a land-construction worker and the record contains no evidence that he was engaged in cargo handling.

4.

There is a conflict with the Ninth Circuit case of *Weyerhaeuser v. Gilmore,* 528 F.2d 957 (9 Cir. 1975) cert. denied. 429 U.S. 868 (1976). The event with which we are concerned in this case is a builder upon a bridge footing permanently affixed to a riverbed. *Gilmore* held that those persons intended to be covered were *"persons customarily considered to be working in the business"*, [Emphasis by the Court] 528 F.2d at 960. Further:

> The occupational hazards intended to be guarded against are the traditional hazards to the ship's service employee arising in the course of this employment; i.e., the perils of the sea ***. Accordingly we believe that to be entitled to the benefits of LHCA, and employee's employment to the traditional work and duties of a ship's service employment. Otherwise the clear and unambiguous congressional language of "maritime employment" is nullified and rendered to read "any employment."

528 F. 2d at 961.

5.

There is a direct conflict between the decision below and that of the Second Circuit in *Fusco v. Perini North River Associates,* 622 F. 2d 1111 (2 Cir. 1980) cert. denied. 101 S. Ct. 959 (1981). The Second Circuit held, in the *Sullivan* case, that handling construction materials was "not performing

operations which longshoremen perform." 622 F. 2d at 1113. In the instant case, the records fails to reveal any handling of material by lifting or moving devices, but rather, only an anticipated setting in place of reusable concrete forms by someone.

6.

The decision below conflicts with the Second Circuit case of *Churchill v. Perini North River Associates,* 622 F. 2d 255 (2 Cir. 1981). Like *Fusco, Churchill* arose out of a sewer construction project in the North River. Churchill was unloading caisson from a barge upon which he was standing when injured. The Second Circuit, following the rule of *Ford,* supra, denied coverage explicitly holding injuries upon the water are not, *ipse dixit,* covered, and such work was not "longshoring operations".

7.

This case involves a substantial question of statutory construction in the administration of the Longshore Act. Despite the clear intent of the Congress to cover those "persons customarily considered to be in the business" [118 Cong. Rec. 36385, Part 27 (1972)] there is rampant confusion and uncertainty with respect to those persons who were, 1) injured while in the vicinity of "navigable waters" covered under the pre-amended Act and 2)allegedly about to do work which may bear some similarities to that which "maritime employment" workers do.

8.

The importance of the question cannot be underscored too severely. The Court, in *Caputo* and *Ford,* has addressed "status" in terms of traditional maritime work. The question of the "miscellaneous" workers who were covered under the pre-amended Act simploy because they were injured upon the navigable water has not been addressed by this Court.

It is perhaps reasonable to categorically state that in every case before the Benefits Review Board where this matter has been broached, as in the case below, it has been the opinion of one member of the board that all injuries covered by the pre-amendment Act are covered in the amended Act. That has been the consistent position of the Department of Labor. Yet the majority of the Board, as in this case, has consistently ruled that bridge construction is not covered by the Act. See *Nold v. Guy F. Adkinson Co.*, 9 BRBS 620 (1979) and *Hemminger v. Newport News Shipbuilding and Dry Dock Co., supra.* It has held that "it is clear that injury over navigable waters in and of itself is an insufficient benchmark by which to ascertain maritime employment." *Neely v. Pittson Stevedoring Corp.*, 12 BRBS 859, 860 (1980) and cases cited therein. *LeMelle v. B. F. Diamond Const. Co.*, 13 BRBS 542 (1931).[5]

9.

Browning, if allowed to stand, eliminates the dual "status" and "situs" tests of the 1972 Amendments -- and it goes further. Before those Amendments the test was simply if the injury occurred "upon" the navigable waters, including "upon" a waterbourne object. *Nacirema Operating Co. v. Johnson*, 396 U.S. 212 (1969).

The case below holds that an injury occurring upon a man-made "island" permanently affixed to the land is covered --simply that, and nothing else, because Browning is believed to have been "highlighting" engineering marks at the time of death. It is suggested he would in the future, handle tools (set reusable concrete forms) -- but never handle cargo[6]

---

5 Reversed. 674 F.2d 296 (4 Cir. 1982)

6 *Webster's Collegiate Dictionary*, Second Edition, 1946, p. 153, defines cargo as "the lading or freight of a ship or other vessel; load; freight. - Syn. See freight." *Ballentine's Law Dictionary*, Third Edition (1969) p. 175, defines cargo as "the load or lading of a ship or other vessel, having no more than a transitory connection with the vessel, the intent being to unload it at the destination or port of call of the vessel." The same work, at p. 1216 defines a

10

The decision below conflicts with the Fifth Circuit in the case of *Avondale Shipyards, Inc. vs. Vinson,* 623 F.2d 1117, n. 1, (5th Cir. 1980). The Fifth Circuit held that the sole function of the court of Appeals "is to correct errors of law and to determine if the BRB *** deferred to the ALJ's fact-finding or has it undertaken de novo review and substituted its views for the ALJ's. *Presley v. Tinsley Maintenance Service,* 529 F.2d 433 (5 Cir. 1976). Yet below, the Eleventh Circuit has disregarded the findings of fact of the ALJ and the Board and substituted other findings unwarranted by the evidence and based solely, if anything, upon remarks of counsel of what he would like to have shown.

11.

The decision below conflicts with the tenor of the holding of the Court in *U.S. Industries/Federal Sheet Metal, Inc. v. Director, Office of Workers Compensation Programs, et al.* _____ U.S. _____, 71 L.Ed. 2d 495 (1982) where this Court held that the District of Columbia's Circuit Court could not remand a case to require the ALJ find an injury where none existed. The court below, without remand, found for itself that the employee decedent was engaged in "longshoring operations" when no testimony existed for that finding.

12.

The decision conflicts with *Perkins v. Marine Terminals Corp.,* 673 F.2d 1097 (9th Cir. 1982) by finding facts on ques-

---

"stevedore" as "one who works in the loading and unloading of ships." The *Oxford Universal Dictionary,* Third Edition, (1955) p. 2017, defines stevedore as "a workman employed either as overseer or laborer in loading or unloading the cargoes of merchant vessels." *Webster, op. cit.,* p. 976 defines stevedore as "one who works at, or is responsible for, the unloading and loading of a vessel in port." Also it shows a longshoreman, *ibid,* at 591, as "a laborer, as a stevedore or loader, who works about the wharfs of a seaport." *Ballentine, op cit.* p. 754, for its definition of longshoremen says "See stevedores."

tions not considered by the Administrative Law Judge or the Review Board. But the Ninth Circuit expressly refused to do so. "[W]e decline to reach this (notice) issue without benefit of the Board's prior reasoning." 673 F.2d at 1105.

CONCLUSION

In view of the conflict of the decision below with the prior decisions of the Court and with the contemporaneous decisions of the Courts of Appeals for the Second and Ninth Circuits and particularly to resolve authoritatively the status to which the Longshoremen's Act Amendments of 1972 affect those not within a maritime employment, Petitioners respectfully pray that the Court grant a writ of certiorari and reverse the decision of the court below.

Because the court below has considered questions not heretofore considered and found facts not previously found and for which there was no support within the record, Petitioners respectfully pray that the Court grant a writ of certiorari and reverse the decision of the court below.

Respectfully submitted,

JOHN E. HOUSER

Attorney for Petitioners
640 Florida Natl. Bank Bldg.
Jacksonville, Fla. 32202-4375
Telephone No. 904-354-5519

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three copies of the foregoing Petition for a Writ of Certiorari to the United States Supreme Court have been furnished by United States prepaid first class mail, on this 28 day of June, 1982, to the following:

Richard Harris, Esquire
Adams, Adams, Breenan & Gardner
Post Office Box 1208
Savannah, Georgia 31498

Solicitor General
Department of Justice
Washington, D.C. 20530

T. Timothy Ryan, Jr.
Solicitor of Labor
Department of Labor
Frances Perkins Building
200 Constitution Ave. N.W.
Suite N-2620
Washington, D.C. 20210

Attorney